PP v. MOHD FIRDAUS ALI

HIGH COURT MALAYA, SHAH ALAM
WONG TECK MENG JC
[CRIMINAL APPEAL NO: 41S(A)-1-05-2015]
29 NOVEMBER 2016

CRIMINAL LAW: *Penal Code – Section 471 – Fraudulently or dishonestly using as genuine a document known to be forged document – Police officer convicted for offence of fabricating chemist report – Whether sentence of three months' imprisonment and fine of RM2,000 adequate*

CRIMINAL PROCEDURE: *Appeal – Appeal against sentence – Appeal by prosecution – Accused person convicted for fabricating chemist report and sentenced to three months' imprisonment and fined RM2,000 – Whether sentence adequate – Whether public interest taken into account in imposing sentence – Whether mitigating factors favoured accused person – Whether higher sentence must be imposed – Penal Code, s. 471*

The respondent was the investigating officer ('IO') for seven drug cases at the High Court. As he was handling too many cases at the material time, the respondent forgot to send the drugs to the chemistry department. Subsequently, he fabricated the chemist report to avoid the cases being ordered a discharge not amounting to acquittal by the court. Hence, the respondent was charged at the Magistrate's Court for fraudulently or dishonestly using as genuine a document which he knew to be forged, an offence under s. 471 of the Penal Code. Upon conviction, he was sentenced to three months' imprisonment and fined RM2,000 in default 60 days' imprisonment. Hence, the present appeal by the prosecution against the sentence imposed by the Magistrate. The issue that arose for adjudication was whether the sentence against the respondent was adequate.

Held (dismissing appeal):

(1) The offence committed by the respondent was a serious offence as it involved a chemist report that was used as evidence in cases which could result in a capital punishment. In deciding the appropriate sentence, public interest must be made priority as it affects the administration of justice. In cases where public interest is crucial, a higher sentence must be imposed on the accused person. However, mitigating factors in favour of the respondent were taken into account. Based on the mitigating factors favourable to the respondent balanced with public interest, the sentence imposed by the Magistrate was upheld. The respondent was adequately punished and should be given a second chance to carry on with his life. (paras 8, 9 & 15)

(2) The respondent took the responsibility to send the impugned drugs to the chemistry department for analysis after his wrongdoing was discovered. The final chemist reports were produced and the cases were rightly tried at the High Court without prejudicing any of the accused persons. The offence committed by the respondent did not really cause any harm to the accused persons. (para 9)

(3) The respondent served the sentence of three months' imprisonment and paid the fine of RM2,000 as imposed by the Magistrate. After serving his sentence, the respondent had consistently attended to the cases where he was involved as the IO. The respondent had also given an undertaking that he would continue to assist the prosecution until the end of all the cases that he was involved as an IO. This was an exemplary conduct of the respondent that should be taken into account in deciding whether the sentence imposed by the Magistrate was sufficient. (paras 11 & 12)

(4) The respondent was remorseful and had started a new life after serving the sentence. He was the sole breadwinner of his family and had lost his job as an inspector. Since he was sacked from the police force, the respondent also lost his right to his pension. Justice must be tempered with mercy. The respondent's personal and family life had been damaged due to his conviction and it would be unjust to further enhance the sentence of imprisonment against the respondent as it would lead to a more severe financial and emotional suffering to the respondent and his family. (paras 10 & 13)

Case(s) referred to:
PP v. Ismail Loyok [1958] 1 LNS 48 HC ***(refd)***
PP v. Shahrul Azuwan Adanan & Anor [2013] 2 CLJ 686 HC ***(refd)***
Yap You Jee v. PP & Other Appeals [2015] 7 CLJ 897 CA ***(refd)***

For the appellant - Mohd Fairuz Johari; DPP
For the respondent - Mohamed Yazzer Azzad Zainudin; M/s Shamsuddin & Co

Reported by Najib Tamby

JUDGMENT

Wong Teck Meng JC:

Introduction

[1] This is an appeal by the appellant against the sentence imposed by the Magistrate on the respondent. A full trial was conducted and at the conclusion of the case, the respondent was found guilty and convicted of the offence. The respondent was charged for the following offence:

Bahawa kamu pada 3/5/2011, di antara lebih kurang jam 9.00 pagi hingga 12.00 tengah hari di bahagaian siasatan jenayah Narkotik, Ibu Pejabat Polis Daerah (IPD) Sepang, di dalam negeri Selangor, secara penipuan telah menggunakan sebagai tulen dokumen yang merupakan suatu suratan yang berupa sebagai dibuat oleh seseorang penjawat awam atas jawatan rasminya iaitu laporan dibawah seksyen 399 Kanun tatacara Jenayah, No Makmal: PJ (FOR) 10262/10-0. Jabatan kimia Malaysia bersabit KLIA Sepang Rpt 10086/2010 bertarikh 25 Mac 2011, yang kamu ada sebab untuk mempercayainya sebagai suatu dokumen palsu, dan dengan itu kamu telah melakukan suatu kesalahan dibawah seksyen 471 Kanun Keseksaan dan boleh dihukum dibawah seksyen 466 Kanun yang sama.

[2] Upon conviction, the respondent was sentenced to three months' imprisonment and fined RM2,000 in default 60 days' imprisonment.

Facts Of The Case

[3] The respondent was the investigating officer (IO) for the seven Iranians drug cases in the High Court of Shah Alam. He submitted a fabricated chemist report (P9) at the Magistrate Court during the case management of the cases. As a result of the submission of the fabricated chemist report (P9), the cases were transferred to the High Court for trial. It subsequently transpired that there was a delay on the part of the respondent in sending the impugned drugs to the chemistry department for analysis.

[4] The respondent forgot to send the drugs to the chemistry department as he was handling too many cases at the material time. Hence, he fabricated the chemist report (P9) to avoid the cases being ordered a discharge not amounting to acquittal by the court. The respondent admitted to his wrongdoing to the Deputy Public Prosecutor, Muhammad Yaseer bin Mohd Nasri (PW1) who was the complainant of this case.

Issue

[5] The issue raised in this appeal was whether the sentence passed by the Magistrate against the respondent was manifestly inadequate as submitted by the appellant.

Decision

[6] It is trite law that an appellate court should be slow in interfering with the decision of the subordinate courts on sentence unless the sentence is illegal or manifestly inadequate or excessive or that the sentencing judge or Magistrate had considered irrelevant factors or had given insufficient or undue weight to some of the facts. This principle can be seen in the case of *Yap You Jee v. PP & Other Appeals* [2015] 7 CLJ 897 at p. 928 (CLJ); [2015] 5 MLJ 334 at p. 363 (MLJ) which states as follows:

> Since it has not been shown that the succeeding sessions court judge had embarked on some extraneous or irrelevant factors in imposing the sentences against the appellants, and having considered of the submission of the learned counsel for the respective appellants, we find no reason to disturb the sentences imposed by the succeeding session court judge which had been affirmed by the High Court. Further, we are of the view that sentences are appropriate in the circumstances of the case.

[7] The Magistrate had stated that the sentence ordered against the respondent was meted out after considering that a full trial was conducted for this case, and that the respondent being an enforcement officer who was the IO of for the Royal Malaysian Police Department should be punished appropriately so as to serve as a deterrent to the other enforcement officers.

[8] This court is of the view that the offence committed by the respondent is a serious offence as it involved a chemist report that was used as evidence in the cases which would result in a capital punishment. In deciding the appropriate sentence, public interest must be made a priority as it affects the administration of justice. In cases where public interest is crucial, a higher sentence must be imposed on the accused person. In the case of *PP v. Ismail Loyok* [1958] 1 LNS 48; [1958] 1 MLJ 223, it was stated that:

> The principles upon which the Courts in this country act are those set out in *R v. Ball* 35 Cr App R 164. The first and foremost consideration of punishment is the public interest. The object of punishing crime is not only to punish the offender but also to deter others. Although it is desirable that the first offender should if possible be kept from coming into contact with hardened criminals, nevertheless other public servants submitted to temptations will not be deterred from succumbing to temptation if they see that the only punishment which it involves is some form of binding-over. Until it is understood by all public servants in this country that the normal punishment for helping themselves to public money is to be sent to prison they will continue to be weak-willed persons prepared to pilfer the till.

[9] However, there are mitigating factors in favour of the respondent in which this court took into account before coming to the decision. The first factor taken into account was that the respondent took the responsibility to send the impugned drugs to the chemistry department for analysis after his wrongdoing was discovered. The final chemist reports were produced and the cases were rightly tried in the High Court without prejudicing any of the accused persons. The confirmed amount of drugs in the final chemist reports was above the threshold of the minimum statutory amount of drugs for the offence of trafficking. In other words, the offence committed by the respondent did not really cause any harm to the accused persons in the cases.

[10] Next, as a result of the conviction, the respondent had lost his job as an inspector. He was sacked from the police force which caused him to lose his right to his pension. After losing his job as an inspector, the respondent worked as a clerk in an accounting firm with only RM1,500 income per

month. He is still doing the same job and he is the sole breadwinner of the family. He has to support his parents, his wife who is a housewife who is not working and his two young children.

[11] This court also took into consideration that the respondent had served the sentence of three months' imprisonment and had paid the fine of RM2,000 imposed by the Magistrate. After serving his sentence, the respondent had consistently attended to the court cases where he was involved as the IO and he is still doing it until today.

[12] During the hearing of this appeal, the respondent had also given an undertaking to the court that he would continue to assist the prosecution until the end of all the cases (about 50 cases) that he was involved as an IO. I take judicial notice that it is normal for a police officer after being dismissed from his post would invariably not turn up for the court cases to assist the prosecution in the cases where he was involved as a police witness. Thus, this is an exemplary conduct of the respondent that should be taken into account in deciding whether the sentence imposed by the Magistrate was sufficient.

[13] This court found that the respondent has been remorseful and has started a new life after serving the sentence. In such a case, after considering all the factors involved, this court is of the firm view that justice must be tempered with mercy. The respondent's personal and family life had been damaged due to this conviction and it would be unjust for this court to further enhance the sentence of imprisonment against the respondent as it would lead to a more severe financial and emotional suffering to the respondent and his family.

[14] This court referred to the case of *PP v. Shahrul Azuwan Adanan & Anor* [2013] 2 CLJ 686; [2013] 8 MLJ 70, which states that:

> If he was brave enough to tempt fate and got caught he must be brave enough to face the natural and probable consequences of his act. But if for any valid reason there is a need to temper justice with mercy a proper balance has to be struck between sympathy for the offender and the pain and suffering that he had inflicted on his victim or the damage that his criminal activity had done to society.

[15] Based on the above mitigating factors favourable to the respondent and balanced it up with public interest, this court agreed with the sentence imposed by the Magistrate. The respondent had been adequately punished and he should be given a second chance to carry on with his life.

Conclusion

[16] In the result, this court dismissed the appeal of the appellant and the sentence passed by the Magistrate was upheld.